

875—218.112(91D) Percentage limitations on nonexempt work.

218.112(1) *Exemption as an executive.* An employee will not qualify for exemption as an executive if the employee devotes more than 20 percent, or in the case of an employee of a retail or service establishment if the employee devotes as much as 40 percent, of the hours worked in the workweek to nonexempt work. This test is applied on a workweek basis and the percentage of time spent on nonexempt work is computed on the time worked by the employee.

218.112(2) *Maximum allowance application.*

a. The maximum allowance of 20 percent for nonexempt work applies unless the establishment by which the employee is employed qualifies for the higher allowance as a retail or service establishment. An establishment must be a distinct physical place of business, open to the general public, which is engaged on the premises in making sales of goods or services to which the concept of retail selling or servicing applies. An establishment must make at least 75 percent of its annual dollar volume of sales of goods or services from sales that are both not for resale and recognized as retail in the particular industry. Types of establishments which may meet these tests include stores selling consumer goods to the public; hotels; motels; restaurants; some types of amusement or recreational establishments (but not those offering wagering or gambling facilities); hospitals, or institutions primarily engaged in the care of the sick, the aged, the mentally ill, or deficient residing on the premises, if open to the general public; public parking lots and parking garages; auto repair shops; gasoline service stations (but not truck stops); funeral homes; cemeteries; etc.

b. Reserved.

c. An establishment engaged in laundering, cleaning, or repairing clothing or fabrics is not a retail or service establishment.

218.112(3) *Percentage limitations—exceptions.* There are two special exceptions to the percentage limitations of 218.112(1):

a. That relating to the employee in “sole charge” of an independent or branch establishment, and

b. That relating to an employee owning a 20 percent interest in the enterprise in which the employee is employed. These except the employee only from the percentage limitations on nonexempt work. They do not except the employee from any of the other requirements of 218.1(91D). Thus, while the percentage limitations on nonexempt work are not applicable, an employee would not qualify for the exemption if the employee performs so much nonexempt work that the employee could no longer meet the requirement of 218.1(1) that the primary duty must consist of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof.

SOURCE: 29 CFR 541.112.